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No. 757.

IN THE

Supreme Court of the United States

October Term, 1923.

JAMES C. DAVIS, Director General of Railroads and Agent under Section 206 of the Transportation Act of 1920,

Petitioner,

against

TIMOTHY DONOVAN, as owner of deck scow "Mary Ethel,"

Respondent.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

JAMES C. DAVIS, Director General of Railroads and Agent under Section 206 of the Transportation Act of 1920, Petitioner, vs. TIMOTHY DONOVAN, as owner of deck scow Mary Ethel, Respondent.	No. 757.

BRIEF FOR PETITIONER.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of the Case.

Respondent filed a libel in personam in the District Court for the Southern District of New York in a cause of collision, civil and maritime. The respondents named in that libel were the "Director General of Railroads of the United States (New York, New Haven & Hartford Railroad Company) and Theodore A. Crane's Sons Company." Libellant prayed for process directed to the respondents, citing them to appear and answer and for judg-

ment for his damages. It does not appear from the record whether process actually was issued and/or served. It does appear, however, that each respondent appeared by answer to the libel.

The libel charges that on March 28, 1919, the scow Mary Ethel, owned by libellant, was securely moored at Pier 2, Erie Basin; that New York, New Haven & Hartford carfloat No. 46 came into collision with the Mary Ethel, causing damage; that carfloat No. 46 was at the repair yards of Crane's Sons Company awaiting repairs; that the collision was caused solely through the fault of carfloat No. 46 and those in charge of her; that the Director General of Railroads at the time was in control of and was operating the New York, New Haven & Hartford Railroad, including carefloat No. 46.

The trial Court found, and the Court of Appeals affirmed the finding, that the Mary Ethel was moored at Pier 2, Erie Basin, New York Harbor; that she was damaged by contact with the New York, New Haven & Hartford carfloat No. 46, which was cast loose by a New York Central tug in removing a New York Central barge, to which the No. 46 had been made fast. At the conclusion of the evidence the District Court held:

> "From all the evidence before me, it seems to me that the last intervening cause of the accident, which occurred to the Mary Ethel, was the fact that the New York Central came in and after removing the New York Central barge, allowed the Number 46 to go adrift, but that fact will not relieve the Director General, operating the New York, New Haven & Hartford Railroad, from liability, inasmuch as he is the same entity that is operating the New York Central.

> Libellant may have a decree as against both parties, but against the Director General in the first instance."

The parties stipulated with respect to libellant's damages and a final decree passed by which libellant recovered from James C. Davis, Director General and as Agent, etc., primarily, and Theodore A. Crane's Sons Company secondarily, the sum of $555.27, which decree directed that said sum should bear interest until paid. Petitioner appealed from that decree to the United States Circuit Court of Appeals, Second Circuit, which Court made an order November 12, 1923, modifying the decree of the District Court by striking out so much thereof as adjudged Theodore A. Crane's Sons Company secondarily liable. The Court of Appeals considered that its decision in *Globe & Rutgers Fire Ins. Co.* vs. *Hines, Agent*, 273 Fed., 774, was in no way affected by the decision of this Court in *Missouri Pacific Railroad Co.* vs. *Ault*, 256 U. S., 554, and was authority for the decree and judgment of the District Court. The Court of Appeals said:

> "We are not here concerned with what questions, if any, may arise as between the railroads and the government. The sole point is that the outside litigant, such as this libellant, need look only to the Director General as the party to respond for damages caused by negligence on the part of any of the railroads which he was operating pursuant to the Federal Control Statutes."

Thus, the courts below have held that the Director General can be required to respond for alleged

negligent acts of his subordinates in the operation of one transportation system in a suit brought against him based upon alleged negligent acts of his subordinates in the operation of another and different transportation system, and when he was before the Court only in his capacity as the operator of the latter transportation system. We contend in thus ruling the courts below erred.

Argument.

I.

The United States has consented to be sued on causes of action arising out of Federal control, and in giving this consent the United States by Acts of Congress, by Presidential Proclamation, and by Orders of the Director General of Railroads, declared its purpose to give to suitors the same right of suit as they would have had against the carrier corporation had Federal control not intervened. The legislation creating that right of suit prescribes the method of bringing suit, and compliance therewith is essential to any enjoyment of the right.

The collision complained of occurred March 28, 1919, and the libel was filed June 13. 1919, which was during Federal control of railroads. The right to sue the Government for injuries arising under Federal control rests on Section 10 of the Federal Control Act, approved March 21, 1918 (40 Stat. L., 451). *Missouri Pac. R. R. Co.* vs. *Ault*, 256 U. S., 554; *Davis* vs. *Slocomb*, 263 U. S., 158, decided Nov. 12, 1923. The applicable part of Section 10 of the Federal Control Act provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. * * * But no process, mesne or final shall be levied against any property under Federal control."

General Order 50-A, issued January 11, 1919, which governed the method of bringing suit, was in force at this time. The applicable part of that General Order provides:

"*It is therefore ordered*, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

> Subject to the provisions of General Orders Nos. 18, 18-A, and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit, or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroads or other carrier company."

This General Order under the Proclamation of the President made December 26, 1917 (40 Stat., 1733), had paramount authority and was entitled to be obeyed as such. *Northern Pac. Rwy. Co.* vs. *North Dakota,* 250 U. S., 135.

The Federal Control Act provides for the "operation of transportation systems." Those systems while under "one control, one administration, one power for the accomplishment of one purpose," nevertheless were separate systems. The control of all systems was centralized, but the operation was several, just as it was before operation by the Government. The word "carriers," as used in Section 10 of the Federal Control Act, is defined by Section 1 of that Act as "railroads and systems of transportation." The thought that we are here emphasizing has been expressed by this Court in the *Ault* case in this language:

> "Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the sub-

stantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore. Here the term 'carriers' was used as it is understood in common speech; meaning the transportation systems as distinguished from the corporations owning or operating them. Congress had in Section 1 declared that such was its meaning. The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such (Bull. No. 4, page 113). Each system was required to file its own tariffs. General Order No. 7, Bull. 4, page 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, *id.*, page 170. Each Federal treasurer was to deal with the finances of a single system; his bank account was to be designated '(Name of Railroad), Federal Account.' General Order No. 37, *id.*, page 313. Each of 165 systems was named individually in the order promulgating the wage awards of the Railroad Wage Commission. General Order No. 27, *id.*, pages 198, 200. And throughout the orders and circulars there are many such expressions as 'two or more railroads or boat lines under Federal control.' See General Order No. 11, *id.* page 170. It is this conception of a transportation system as an entity which dominates Section 10 of the Act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the Government's

needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whoever, as the party operating the same, was legally responsible under existing law, although it were the Government."

The enabling laws authorizing the bringing of suits against the United States upon causes of action arising out of Federal control contain certain directions and a limitation.

Those suits must be:

(a) Brought against the Director General of Railroads (G. O., 50-A);

(b) Based on contract binding on the Director General of Railroads, claim for death or injury to person, for loss or damage to property, which but for Federal control might have been brought against the carrier company (G. O., 50-A);

(c) Brought at law, in equity or in admiralty (G. O., 50-A);

(d) Brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose (G. O., 18-A); and

(e) Service of process may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arose, in the same way as service was theretofore made upon like operating officials for such railroad or other carrier company (G. O., 50-A).

The limitation is:

(f) Actions, suits or proceedings for the recovery of fines, penalties and forfeitures, are not authorized (G. O., 50-A).

This Court held in *Davis* vs. *Wechsler*, 263 U. S., 22, that the provisions of General Order 18-A, requiring suit against the Director General of Railroads under Federal control to be brought in the county or district where the plaintiff resided at the time of the accrual of the action or in the county or district where the cause of action arose, was valid and superseded the provisions of local law governing the venue of actions.

The courts below misapprehended the real question involved, in the case at bar, which is not whether the Director General in his operation of the New York Central system is the same entity operating the New Haven system, but rather has the United States consented to be sued otherwise than is prescribed by Section 10 of the Federal Control Act and the provisions of General Order, 50-A. The courts below have omitted to give effect to these requirements simply because the Director General was before the Court. In so doing, we submit, the courts exceeded their jurisdiction. This Court, in *Belknap* vs. *Schild*, 161 U. S., 10, at page 16, said:

> "The United States, however, like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued. This doctrine has been affirmed by this Court in cases too numerous to be cited; and was clearly stated by Mr. Justice Field, delivering judgment in the case of *The Siren*, as follows: 'It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy: the inconvenience and danger which would follow from any different rule. It is obvious

> that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be sujected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress."

In *United States* vs. *Gleason*, 124 U. S., 255, 258, the Court said:

> "The United States can be sued for such causes and in such courts only as they have by act of Congress permitted. Neither the Court of Claims nor this Court can hear and determine any claims against the United States, except in the cases, *and under the conditions, defined by Congress.*" (Italics ours.)

In *Schillinger* vs. *United States*, 155 U. S., 163, 166, Mr. Justice Brewer, speaking for the Court, said:

> "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases *and contingencies* in which the liability of the Government is submitted to the courts for judicial determination. *Beyond the letter of such consent, the courts may not go*, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government." (Italics ours.)

The courts below were of the opinion that the decision of the Circuit Court of Appeals in *Globe & Rutgers Fire Ins. Co.* vs. *Hines* (273 Fed., 774; Cert. denied, 257 U. S., 643), was conclusive in the instant case, and that that decision was in no way affected by the decision of this Court in *Missouri Pacific R. Co.* vs. *Ault* (256 U. S., 554). We think this arises out of a misapprehension of the *Globe-Rutgers* case. In that case it was decided that the Director General could not sue himself and that was the only decision made. So understood, it was not authority for the decision of the lower courts in this case. If it be considered that the *Globe-Rutgers* case decides something more than that the Director General cannot sue himself and is authority for the judgments under review, then we contend that those judgments are erroneous and that the *Globe-Rutgers* case must be considered overruled by the decision of this Court in the *Ault* case, *supra*. This position has been sustained by the Supreme Court of Minnesota in *Granquist* vs. *Duluth, M. & N. Ry. Co.*, 193 N. W., 126, where that Court said:

> "The statement that, when Federal control began, all the railroads were organized into a unified national system under the direction of a single head is found in Globe, etc. vs. Hines (C. C. A.), 273 Fed., 774. But in Missouri Pac. Rd. Co. vs. Ault, 256 U. S., 554, 41 Sup. Ct., 593, 65 L. Ed., 1087, Mr. Justice Brandeis, speaking for the Court, said that the President took over the physical properties of the railroads as transportation systems and placed them under a single directing head; that the situation was analogous to that which would have existed if there had been a general receivership of each system; that the President

took over the physical properties, the transportation systems as entities, and they were always dealt with as such; that the conception of a transportation system as an entity dominated the act authorizing Federal control; and that the systems were regarded much as ships are regarded in admiralty and are dealt with as active, responsible parties, answerable for their own wrongs."

II.

The Federal courts, outside of the Second Circuit, and the Appellate courts of nine states, have rendered decisions which are opposed to the decision of the Circuit Court of Appeals under review.

Federal Cases.

The Circuit Court of Appeals for the Fourth Circuit, in *Manbar Coal Co.* vs. *Davis, Agent, etc.* (decided March 10, 1924, not yet reported, the entire opinion being printed as an appendix to this brief), a suit brought to recover damages suffered in consequence of the Government's failing and refusing during the period of Federal control to furnish the coal company with an adequate number of cars in which to transport its coal, said:

> "Should the plaintiff take anything under its third count, the theory of which is that the Director General of Railroads was bound to treat all the railroads and all the cars under his control as if they were a single system and if he had not coal cars enough to supply every mine in the United States with all for which it had legitimate need, he was bound to work out and apply a system of distribution by which

each mine should receive substantially as large a percentage of the number for which it had reasonably asked as was furnished to any other in all the wide stretch from Quoddy Head to San Diego and from Key West to Puget Sound. We shall put on one side the perhaps pertinent inquiry whether the law would require the rule of equal and ratable distribution to be rigidly applied over so great an area and in which conditions, climates, and seasonable needs differed so widely, even if all the railroads were consolidated under the control of a single privately owned company. It is at least conceivable that under such conditions many questions would arise which in the public interest and with justice to all could only be dealt with by laying down by the Interstate Commerce Commission of one of many administrative rules governing the distribution of cars.

We do not go into the inquiry, interesting as its possibilities are, because we are persuaded that Congress has given no one the right to sue the Director General or his successor, the agent designated by the President, for anything the former did or left undone as the operator of *all* the railroads in the United States. On the contrary, it has been careful to limit his liability to such acts as he did or did not do as the Director of a particular carrier. If the carrier had, previous to Federal control, done or left undone what is charged against him and it could then have been sued for it, he is liable and not otherwise. Section 206-A of the Transportation Act, February 28, 1920. As the Supreme Court has said each railroad system has been personified as in admiralty ships long have been. *Missouri Pacific Rway. Co.* vs. *Ault*, 256 U. S., 554. Unless same particular carrier as the active responsible party could previous to Federal control have

been held answerable for the wrong charged against the Director General, if done by it, he is not liable. In accordance with this principle he may in the same suit, if justice requires it, be dealt with as if he were two persons and not one. *Granquist* vs. *Duluth M. & N. Rway. Co.*, 193 N. W., 126; *St. Louis B. & M. Rway. Co.* vs. *McLean*, 253 S. W., 248. Plaintiff sued the defendant in virtue of the Director General's control of the Chesapeake & Ohio Rway. Co. and had process served upon him by service upon an agent of that railway. He was brought into court to answer for a wrong done by the Director General for which the Cheasapeake & Ohio Railway but for Federal control would have been suable and for that wrong alone."

The Court of Appeals of the District of Columbia in April, 1923, rendered a decision in *Whalen Paper & Pulp Mills* vs. *Davis*, etc., 288 Fed Rep., 438. It there appeared that an action was begun in the Supreme Court of the District of Columbia by *Whalen Paper & Pulp Mills* vs. *James C. Davis, Director General of Railroads and Agent of the President*, in which the plaintiff alleged that it had shipped certain consignments of crude sulphur from Bryanmound, Texas, to Prince Rupert, Canada, over the Houston & Brazos Valley Railroad and other systems of transportation then under Federal control, and that an excessive rate of freight had been exacted, for which overcharge plaintiff brought suit. Process was served upon Mr. Davis, Director General and Agent, etc., in person. A motion was made to quash the service upon the ground that a contract had been made under the statute with the Houston & Brazos Valley Railroad for the conduct by it of litigation

arising out of its operation during Federal control, and that no valid service of process could be made upon the defendant except only by service upon an operating officer of said railroad authorized by law to be served with process in actions brought against it. The Supreme Court of the District of Columbia sustained this motion and the service was quashed. This service was attempted to be made under the provisions of Section 206 of the Transportation Act of 1920, set forth as an appendix to this brief. The Court of Appeals said:

> "While the carriers were under Federal control the venue of actions like this was governed by General Orders 18, 18a, 26 and 50, promulgated by the Director General of Railroads. The courts take judicial notice of such orders. *Haas* vs. *Henkel*, 216 U. S., 462, 30 Sup. Ct., 259, 54 L. Ed., 569, 17 Ann. Cas., 1112. The orders directed that all such actions against the Director General of Railroads must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose, and that process may be served therein upon the operating officials, operating the carrier for the Director General of Railroads. The orders expressly declared it to be necessary in the public interest that the venue in such cases should be thus restricted. The provisions for venue therefore, was expressly mandatory, and the cognate provision for process was impliedly so, although the word 'may' was employed as in this instance in respect thereto. Both provisions were clearly intended to be regulatory in character and the given procedure was not left to the election of the suitor.
>
> When the Federal control of carriers was terminated by the Transportation Act of 1920,

Congress provided by section 206 for the survival against the government of causes of action based upon the Federal operation of the carriers, and again prescribed the venue and the method of serving process therein. The latter provisions, like their predecessors, were designed as authoritative provisions for the regulation of such litigation and like them were mandatory in character. Accordingly the mode of service attempted in this case was unauthorized and was rightly set aside.

These conclusions, furthermore, are consistent with the fair import of the language of paragraph (b), for where permission is granted under certain express conditions to serve process in a given manner, it is thereby implied that the authority cannot be exercised under opposite conditions. In the present instance that interpretation is sustained, and indeed required, by the fact that paragraph (b), while providing with great particularity for the service of process upon the defendant by means of service upon his legal representatives, make no reference whatever to the service of process upon him personally.

It will be understood, of course, that the foregoing reasons all rest finally upon the conceded rule that, when the United States consents to be sued, the method of procedure prescribed by Congress as part of the consent must be strictly followed, in order to secure jurisdiction; for in such case the remedy of the suitor depends wholly upon the government's consent, and it cannot be enlarged beyond the clear terms thereof. This rule applies also 'where a particular method of serving process is pointed out by the statute.' *Amy* vs. *Watertown*, 130 U. S., 301, 317, 9 Sup. Ct., 530, 32 L. Ed., 946; *Schillinger* vs. *United States*, 155 U. S., 163, 166, 15 Sup. Ct., 85, 39 L. Ed., 108; *McElrath* vs. *United States*, 102

U. S., 426, 440, 26 L. Ed., 189; *Price* vs. *United States*, 174 U. S., 373, 375, 19 Sup. Ct., 765, 43 L. Ed., 1011."

State Cases.

The Supreme Court of Minnesota decided *Granquist* vs. *Duluth, M. & N. Ry. Co.*, 193 N. W., 126, in April, 1923. It there appeared that an action for wrongful death of plaintiff's intestate was brought against John Barton Payne, as Agent designated by the President under the Transportation Act of 1920, respecting his operation of the Duluth, Missabe & Northern Railway Company. Process was served upon the Treasurer of the Duluth, M. & N. Ry. Co., and no service was made upon an officer of the Great Northern Railway. Application was made to the Court to amend the complaint by adding allegations respecting the operation by the Director General of the Great Northern Railway. The Supreme Court of Minnesota held that this could not be done, and said:

> "The original complaint contains no reference whatever to the Great Northern Railway System. So far as the representative of the government is concerned, the sole charge of negligence relates to the operation of the Duluth, Missabe & Northern system. Appellant takes the position that after the railroad systems of the country passed under Federal control, first the Director General, and later the agent designated by the President, was the only necessary or proper party defendant, where suit was brought to enforce a cause of action arising out of the operation of any such

railroad system. More specifically, it is contended that the service of the summons brought the agent of the President into court not only as the representative of the United States in control of the Duluth, Missabe & Northern, but also as its representative in control of all other railroads which had been taken over. The contention is that all the railroad properties in the United States under such control were organized into a unified national system of transportation under a single head, and that service of process on an officer or agent of one of the carrier companies brought the representative of the government into court to defend as to any carrier which might have been joined as a defendant prior to Federal control. * * *

In authorizing the bringing of actions against the representative of the United States, Congress has employed language indicating that the cause of action asserted against him must be one which arose out of the possession or use of the particular railroad which might have been sued if there had not been Federal control, and that the service of process upon an officer or agent of such railroad would give the Court jurisdiction over the agent of the President only in his capacity as representative of the government in the operation of that particular railroad." (Pages 126-27.)

The Supreme Court of Ohio, in *Payne, Director General* vs. *Lind,* 106 Ohio St., 14, held that when the Federal Government took over the operation of the railroad systems of the United States, the several systems did not thereby lose their identity and become merged in a common entity. Separate actions were brought by the administratrix of John Lind against the Baltimore & Ohio Southwestern Railroad Company and the Cleveland, Cincinnati

& St. Louis Railway Company to recover for the wrongful death of Lind, which occurred November 24, 1918. John Barton Payne, Director General, was substituted in each case as defendant. It appears that Lind was in the employ of the C. C. C. & St. L. Ry. Company performing certain duties in and about the Central Union Depot at Cincinnati in the preparation of cars and trains for departure. During Federal control car inspectors were ordered to inspect all trains at the depot, to whomsoever they belonged, and the C. C. C. & St. L. Ry. Co. collected from the other companies for the service rendered. The evidence failed to disclose any negligent act on the part of the Director General operating the C. C. C. & St. L. Railway. At the close of plaintiff's case separate motions were made on behalf of the Director General operating the two systems for a directed verdict, each of which was overruled upon the theory that when the Government took over the operation of the railroad systems of the country each particular system lost its entity and all became merged into one system, and that therefore the negligence of any of the component parts of the system became the negligence of the whole system. In reversing this ruling the Supreme Court said:

> "The trial Court in this respect was in error. The government took over the control, but did not take over the ownership. The different systems were placed under one head, but were not consolidated. The Director General in the operation of the Baltimore & Ohio Southwestern Railroad was a separate entity from the Director General in the operation of the Cleveland, Cincinnati, Chicago & St. Louis Railway and the negligence of the Director General

in the operation of the Baltimore & Ohio Southwestern Railroad was no more attributable to the Director General in the operation of the Cleveland, Cincinnati, Chicago & St. Louis Railway that it would have been either before or subsequent to Federal control. The motion, therefore, to direct a verdict in favor of the Director General for the Cleveland, Cincinnati, Chicago & St. Louis Railway should have been sustained. * * *

By the averments of the amended petition and the admissions of the answer of the Director General operating the Baltimore & Ohio Southwestern Railroad Company, and the amended answer of the Director General operating the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, there was no issue upon the subject of who was the employer of the decedent, the pleadings establishing the fact that the Director General operating the Cleveland, Cincinnati, Chicago & St. Louis Railway Company was the employer, and that the Director General operating the Baltimore & Ohio Southwestern Railroad Company was not the employer. That being so, the Federal Employers' Liability Act, permitting recovery under the proportionate negligence rule, had no application, and it was error to charge the jury that contributory negligence was not a bar to recovery, but operated only to diminish the damages."

The Supreme Court of Michigan in *Bostwick* vs. *Director General*, 220 Mich., 21, held that Federal control of railroads did not consolidate individual carriers and did not constitute the employees of the different railroad systems fellow-servants of each other. On March 9, 1918, plaintiff was working as a brakeman on a train engaged in moving freight cars on the Wabash Railroad in Detroit. In the

course of his employment he was struck by a Pere Marquette locomotive and injured. By the first count of his declaration he claimed recovery for the negligence on the part of the employees of both trains; by the second count he claimed recovery under the Federal Employers' Liability Act. At the conclusion of the evidence he was compelled to elect between the two counts and chose the second. The trial court charged that no recovery could be had based on negligence in the operation of the Wabash Railroad and further charged that plaintiff might recover under the Employers' Liability Act in case the negligence of the crew of the Pere Marquette train caused his injury. In reversing the judgment of the trial court the Supreme Court said:

> "We feel constrained to hold that the plaintiff, while engaged in the operation of the Wabash train, was not a fellow servant of the crew operating the Pere Marquette train; that he had no right of recovery under the Federal employers' liability act and that defendant's request for a directed verdict should have been given. Plaintiff's election to proceed under the second count was not voluntary. His right to recover under the first count was not passed upon by the trial court. The judgment must therefore be set aside and a new trial ordered with costs to defendant."

The Appellate Court of Illinois, in *Cardwell* vs. *Payne*, 226 Ill. App., 227, considered a case where plaintiff sued to recover damages sustained in connection with a shipment of hay from Chicago to Nashville, Tennessee. Process was served upon the Director General operating the Michigan Central Railroad and also on the Director General operat-

ing the Grand Trunk Railroad by service upon representatives of each road. A separate appearance and defense was made by each road. The cause was heard before the court without a jury, and at the conclusion of plaintiff's evidence each defendant moved to find the issues in its favor. The motions were denied and the court found the issues for the plaintiff and against both defendants and assessed the damages. In reversing this judgment the Appellate Court said:

> "The Director General operating the Michigan Central, or the Federal agent succeeding him, can only be liable for damages resulting from the shipment over the Michigan Central, and the Director General operating the Grand Trunk, or the Federal agent succeeding him, can only be liable for damages resulting from the shipment over the Grand Trunk. The fact that the Director General or the Federal agent is the same individual in both cases does not permit the prosecution of both actions in one suit and recovery of a joint judgment. The two causes of action are just as separate and distinct as they would have been had they arisen prior to Federal control. Therefore the joint judgment recovered in the case at bar cannot stand."

The Supreme Court of Georgia, in *Payne, Agent, etc.* vs. *Lyon,* 154 Ga., 501, reversed a judgment rendered under the following circumstances: Lyon, a locomotive fireman of the Louisville & Nashville Railroad Company, which was being operated by the Director General of Railroads, was injured on January 25, 1919, by an engine of the Louisville & Nashville Railroad Company on which he was a fireman and which was pulling a train

of that company over the tracks of the Western & Atlantic Railroad Company, which was also being operated by the Director General of Railroads. The injuries were caused by the engine having run into a land slide on the track of the latter company. Lyon brought suit against the Director General of Railroads, alleging that the employees of the Director General on a train of the Western & Atlantic Railroad, which had immediately preceded the engine over the track, had been negligent in not informing the engineer of the engine that the land slide had occurred and that the section foreman of the Western & Atlantic Railroad system was also negligent in not reporting the land slide to the approaching engine. The plaintiff introduced in evidence, over objection, rules of the Operating Department of the Louisville & Nashville Railroad Company, requiring a prompt report by its employees regarding damage to tracks or structures. The Director General's objection was based on the ground that operating rules applicable to the Louisville & Nashville Railroad system's employees did not apply to employees of the Western & Atlantic Railroad system, on whose tracks the land slide and injury to the plaintiff occurred. The plaintiff contended that the introduction of the rules was proper because the suit was against the Director General as Director General of both the Western & Atlantic Railroad and the Louisville & Nashville Railroad. The Supreme Court of Georgia held that the rules were improperly admitted in evidence because—

> "The Director General is to be treated as the director of each separate system of transportation. The separate systems which

were operated by him were separate and distinct parties. *Smith* vs. *Babcock & Wilcox*, 260 Fed., 679; *Davis* vs. *Dantzler Lumber Co.* (Miss.), 89 So., 148; *Harmon* vs. *Hines* (S. C.), 101 S. E., 925; *Payne* vs. *Coleman* (Tex. Civ. App.), 232 S. W., 537; *Payne* vs. *Monroe*, 28 Ga. App., 6 (110 S. E., 34). The W. & A. R. R. Co. is a separate and distinct corporation. *Nashville, etc. Railway* vs. *Edwards* (91 Ga., 24); *Brannon* vs. *Nashville, etc. Ry.*, 119 Ga., 738-744."

The Georgia Court of Appeals, in *Director General* vs. *Monroe*, 28 Ga. App., 6, said:

"Federal control, under the Acts of Congress, and the proclamation and orders of the President of the United States and the Director General of Railroads, while effecting a consolidation of the physical control of the different transportation systems, did not effect a consolidation of the individual companies, so far as their respective legal rights and liabilities were concerned. *Missouri Pacific R. Co.* vs. *Ault*, 256 U. S., 554, 41 Sup. Ct., 593, 595, 596, 65 L. Ed.; *Hines* vs. *McCook*, 25 Ga. App., 395 (103 S. E., 690); 4 A. L. R., 1680, case notes; 10 A. L. R., 956, notes; 8 A. L. R., 969, notes; 13 A. L. R., 1023, notes. Hence the allegation that the receiving and routing agent, making the misleading statements, was the agent of the Director General, did not amount to an allegation that he was the agent of the delivering carrier that, as a warehouseman, made and collected the demurrage charge after the termination of the transportation."

The Supreme Court of South Carolina, in *Harmon* vs. *Hines*, 139 S. C., 179, said:

"This is an action for the value of six bales of cotton alleged to have been delivered to defendant at Swansea, a station on the line of the Seaboard Air Line Railway in Lexington County on or about May 25, 1918, to be carried to the plaintiff at Lexington, a station on the line of the Southern Railway Company. February 13, 1919, the summons was served upon the agent on a line of the Southern Railway at Lexington. A motion was duly made to set aside the service of the summons on the ground that J. C. Kirkland, upon whom the service was made, was an agent of the Government on a line of the Southern Railway, operated by the Director General of Railroads, but he had no connection with the operation of the Seaboard Air Line Railroad, the carrier in respect of which, as indicated in the complaint, the cause of action arose. This appeal is from an order of his Honor, Judge Maudlin, April 5, 1919, overruling the motion.

The exceptions must be sustained, as General Orders No. 50 and No. 50-a require service of process to be 'made upon operating officials operating for the Director General of Railroads the railroads or other carrier in respect of which the cause of action arises.'

A review of the act of Congress, the proclamation of the President, and the general orders of the Director General shows no intention on the part of the government to destroy the identity and integrity of the several railway systems. The control of the government is absolute; yet the identity of each system is retained for the operating and accounting. The service on the agent of the Southern was not a good service. Service should have been made upon an agent in control of the railroad in respect of which the cause of action arose. Service cannot be made on any

agent of any road over which the Director General has assumed control, but only upon an official operating the railroad in respect to which the cause of action arose.

Judgment reversed."

The Supreme Court of Arkansas, in *Farr* vs. *St. Louis Southwestern Railway Company,* 154 Ark., 585, considered a suit brought against the St. Louis Southwestern Railway Company and Hines, Director General, to recover damages arising out of a delay to a shipment of a carload of sweet potatoes from Magnolia, Arkansas, to Dallas, Texas. The shipment was originally delivered to the Louisiana & Northwestern Railway Company at Magnolia, Arkansas. At the time of shipment the initial carrier was not under Federal control and was in the hands of a receiver. It delivered the shipment to a connecting carrier, which was a Missouri corporation doing business in Arkansas, which in turn delivered it to the delivering carrier, a Texas corportion doing business in that state, being separate and distinct corporations, but both at the time being controlled and operated by the Director General of Railroads. Process was served on the officials of the Missouri corporation and the trial court held that that service was not sufficient to warrant a recovery against the Director General operating the Texas corporation. In affirming this judgment the Supreme Court said:

"(1) Proceeding upon the theory that the Director General of Railroads was in court under the summons issued and served upon his agent at Waldo, Ark., only as the representative of the St. Louis, Southwestern Railroad Company, and not the representative by virtue

of the service upon him, of the St. Louis, Southwestern Railroad Company of Texas, the trial Court instructed the jury that, before they could find against the Director General, they must find that the damage occurred between McNeil and Texarkana, on the line of the St. Louis, Southwestern Railroad Company. We think the interpretation placed upon the Federal Control Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, Secs. 3115¾a-3115¾p) by the trial Court, as reflected by the instruction, is correct. While, under the act, General Orders Nos. 18 and 18a were made, directing all suits against the Director General to be brought in the county or district where the plaintiff resides, or county or district where the cause of action arose, such orders were not intended to change the manner or mode for the service of process in the several states. We think the provision relating to service of process under General Order No. 50, dated October 28, 1918, indicates very clearly that the service of process in actions, suits and proceedings against the Director General of Railroads shall be made in the same way as formerly made against the transportation entity he represents. In other words, to bring the Director General of a particular transportation corporation into court in this State, the same process must be resorted to necessary to bring the corporation itself into court. Under the process in the instant case the Director General of Railroads is in court only in his capacity as representative of the St. Louis, Southwestern Railroad Company, and not as the representative of the Texas corporation bearing the same name."

The Supreme Court of Texas adopted and approved the judgment of the Commission of Appeals of Texas in *St. Louis B. & M. Rwy.* vs. *McLean*, 253 S. W., 248. The Commission of Appeals said:

"On January 25, 1918, the railroad lines of the St. Louis, Brownsville & Mexico Railway Company and the Texas Mexican Railway Company, were both under Federal control, and were being operated by W. G. McAdoo, Director General of Railroads. The Texas Mexican Railway Company owned a line of railroad from Corpus Christie to Robstown, over which its passenger trains were operated, and under some kind of agreement the passenger trains of the St. Louis, Brownsville & Mexico Railway Company were operated over this line between the same points. On that date W. F. McLean was conductor in charge of a passenger train of the St. Louis, Brownsville & Mexico Railway Company. About 7:20 a. m. of that day, while in the act of stopping, or immediately after having stopped, at the station of Clarkwood, the train on which McLean was conductor was run into from the rear by a passenger train of the Texas, Mexican Railway Company, and McLean was instantly killed. * * *

It appears that from the beginning defendant in error has proceeded upon the theory that the Director General of Railroads held the position of directing head of all railroads and railway systems, considered as one entity, and as such could be sued in his general capacity as a representative of the Government, without respect to any particular railroad or carrier operated by him; and that all employes on the various railroads were his employes and related to each other and to him as common servants of a common master. To put the matter more concretely: It is her contention that the Director General of Railroads in his operation of the Texas Mexican Railway sustained exactly the same relation to McLean as he did in his operation of the St. Louis, Brownsville & Mexico Railroad; that there being no recognition of separate railroads or car-

riers in the matter of operation, liability was therefore fixed by the relation of McLean to the Director General as the directing head of all railroads, and not by the relation sustained by the Director General to either the St. Louis, Brownsville & Mexico Railroad or the Texas Mexican Railway.

Plaintiff in error has been equally insistent in his contention, that the Acts of Congress authorizing Federal control of railroads fixed the legal liability of the Director General in the operations of railroads as separate entities, the same as before Federal control; and the Director General in respect of the operation of one particular railroad was a different party from the Director General in respect of the operation of another railroad, so far as liability growing out of operations was concerned. In other words, it is his contention that the Director General, in respect of the operation of the St. Louis, Brownsville & Mexico Railroad, sustained to McLean an entirely different relation than that sustained by the Director General in respect of the operation of the Texas Mexican Railway.

This presents the question of great importance in the case. Its proper determination will not only control the result of this appeal, but will have much to do with the rights of the parties on another trial.

From the pleadings of defendant in error, it is apparent that she is seeking to recover under the Federal Employers' Liability Act (U. S. Comp. St., §§ 8657-8665), upon the theory that there was no distinction between the employes in charge of the different trains, but that they were each and all alike servants of the Director General. If the contention of plaintiff in error is correct, then she would have no right to proceed under the Employers' Liability Act against the Director General in respect of the operation of the Texas Mexican Railway, but

only on the basis of negligence; but she could proceed under the Employers' Liability Act against the Director General in respect of the operation of the St. Louis, Brownsville & Mexico Railroad. Under the first proceeding contributory negligence would be a complete bar to a recovery, but under the second it would only result in diminishing the damages, in the event of a recovery. The question therefore, is of controlling importance.

* * * * * * *

In our judgment the Supreme Court of the United States in the case of *Missouri Pacific R. Co.* vs. *Ault*, 256 U. S., 554, 41 Sup. Ct., 593, 65 L. Ed., 1087, has determined this precise question; but, as is frequently the case, counsel for both parties insist that it is to be construed as favorable to each of their contentions. We do not deem it necessary to fully review the Acts of Congress, the orders of the President, and the orders of the Director General, establishing and relating to Federal control of railroads, but believe the quotations we are making from the case just referred to and other cases will sufficiently explain the purpose of the act and make clear the conclusion we have reached.

* * * * * * *

The conclusion deduced from this decision and numerous other decisions is: That while the control and power over all railroads and transportation systems by the Government under Federal control was supreme and exclusive, so far as management and operation to the accomplishment of the purpose of the Government was concerned, yet this control did not effect a consolidation of the individual companies, so far as their respective legal rights and liabilities were concerned; but each and all remained separate and distinct entities, and liability of Director General could not be maintained because of his position as direct-

ing and controlling head of all railroads, but could be maintained only when it grew out of the possession, use, control, or operation of some particular railroad or transportation system; and it was necessary for him to be sued in his capacity as Director General in respect to such particular railroad system.'

The Court of Civil Appeals of Texas, in *Payne, Agent* vs. *Coleman*, 232 S. W., 537, said:

"The appellee, Coleman, sued John Barton Payne, Federal Agent, in the County Court of Hale County, to recover the value of a car of coal, shipped from a point in Colorado to plaintiff at Plainview, Tex. It was alleged that the shipment was made while the railroads were under Federal control.

* * * * * * *

The said John Barton Payne, Agent, 'as he is agent for the Fort Worth & Denver City Railway Company, under the Transportation Act of 1920,' filed a plea of privilege to be sued in some county in which the said railway company might be sued. * * * It is further alleged in said plea that the car of coal in question was delivered to the Fort Worth & Denver City Railway Company by the Colorado & Southern Railway Company and transported by said railway company to Channing, in Hartley County, Tex., at which place it was confiscated by the sheriff of Hartley County; that the shipment was never delivered to the Panhandle & Santa Fe Railway Company, and was not transported by it, so that there was no liability on the part of the defendant as agent representing the Panhandle & Santa Fe Railway Company, and that his joinder as agent of said company was made for the fraudulent purpose of acquiring jurisdiction of the suit in Hale County.

* * * * * * *

The venue of suits against the Federal Agent on causes of action arising out of the operation of any particular railroad by the Government is that fixed by law for the prosecution of such suits on such causes of action as if they had 'arisen against such carrier.' Section 206, Transportation Act 1920 (41 Stat., 461); *Seaver* vs. *Hines* (D. C.), 261 Fed., 239; *Smith* vs. *Babcock* (D. C.), 260 Fed., 679. So in the further discussion of the case we will refer to the facts as if the railway companies were defendants instead of the Federal Agent. * * * We doubt if this is a case where it would have been necessary to aver any fraudulent purpose on the part of the plaintiff. However, we need not decide the question, as such allegation was made, and we think the evidence would require a finding of legal fraud in the joinder of the Panhandle & Santa Fe Railroad Company. * * * If plaintiff, knowing the facts, which would in law defeat the venue in Hale County, yet brought such suit, making allegations which would confer venue in such county, such allegations, would be in law fraudulent. *Railway Co.* vs. *Waddel Bros.*, 38 Tex. Civ. App., 434, 86 S. W., 655. We think the plea in behalf of the Fort Worth & Denver City Railway Company should have been sustained * * *."

The Supreme Court of Mississippi, in *Davis* vs. *L. N. Dantzler Lumber Co.*, 126 Miss., 812, said:

"The above quotation from the United States Supreme Court in the Ault case, shows clearly that the Director General is to be treated as a Director General of each separate system of transportation, and that the separate transportation systems being operated by the Director General are separate parties within the meaning and purpose of the Federal

> Control Act construed by the Supreme Court. Therefore, as the answer shows that the Mobile & Ohio Railroad Company's transportation system is a party indebted to the Texas & Pacific Railway Company as another party for the purpose of suits, the judgment of the court below awarding judgment against the Mobile & Ohio Railroad Company, is, in effect, in view of the substitution made, a judgment against the Director General of the Mobile & Ohio Railroad Company, and that the complainant is entitled to recover of the Director General of the Mobile & Ohio Railroad Company said sum."

This case subsequently came before this Court but was reversed upon another ground. 261 U. S., 280.

The only case that the writer of this brief has been able to discover in the Appellate Court of any State which adopts a view contrary to the cases hereinabove quoted is *Davis* vs. *Alexander,* 220 Pac., Rep., 358, decided by the Supreme Court of Oklahoma.

III.

The interpretation of the law and the practical application thereof by officials of the Railroad Administration.

The officials of the Railroad Administration throughout the period of Federal control and the succeeding period of liquidation regarded each transportation system under Federal control as distinct and separate from each other transportation system under Federal control. The Director General of Railroads practically interpreted his

duties under the statutes as being analagous to those of a receiver of each particular carrier system. In his report, dated February 28, 1920, he said:

> "There has been a somewhat general impression that the railroads during government control have been 'scrambled' to such an extent that the resumption of private operation would be difficult. This is not the case. During government control, generally speaking, each railroad has been under separate management and under the immediate direction of a manager identified with its management prior to government control, and from an operating standpoint it will be a simple process on March 1 for such managers to begin reporting to the corporate executives who will then resume active direction."

Provision was made for the continuance of pending litigation after the end of Federal control by the legal departments of the various carrier systems. The standard form of contract made pursuant to Section 1 of the Federal Control Act between the Director General of Railroads and each railroad company, Form A, Oct. 22, 1918, printed at pages 38 to 58 of Bulletin 4 (Revised), of the United States Railroad Administration, provided (Section 9f):

> "After Federal control no claim by or against the Director General shall be settled by the company against the written objection of the Director General or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claim or out of operations during Federal control shall be in

charge of the company's legal force and the expense thereof shall be paid by the company; but the Director General or the Attorney General may, at the expense of the United States, employ special counsel in connection with any such litigation."

It is clear from the foregoing that it was the intention to maintain the integrity of the various transportation systems taken over by the United States as a war measure and to administer their affairs in such a way as to cause as little confusion as the situation and the public emergency permitted. The Federal Control Act and the orders of the Director General of Railroads, as well as the Transportation Act of 1920, recognized this intention and provided in precise terms how suits should be brought against the United States in respect of claims arising out of Federal control. In enacting the Transportation Act, Congress followed the method laid down by the orders of the Director General of Railroads and required that suits should be brought in such a way as to preserve the careful program which had been established by the executives to maintain the integrity of each transportation system.

In the instant case the New York, New Haven & Hartford Railroad Company was under no obligation to defend the Director General of Railroads or the agent appointed under Section 206 of the Transportation Act of 1920 in suits arising out of his operation of the New York Central Railroad system. The New York Central operating officials not having been served with process in this suit, its legal department necessarily knew nothing of the suit either before or after Federal control,

and no evidence was offered by or on behalf of the Director General operating the New York Central system.

There is now pending in the District Court for the Southern District of New York, a suit at law brought against the Director General of Railroads and agent of the President under Section 206 of the Transportation Act of 1920, where the District Court has applied the decision of the Circuit Court of Appeals in the *Globe-Rutgers* case, which application demonstrates how that decision as applied in the Southern District of New York overturns the set-up of the Railroad Administration in dealing with litigations arising under Federal control. The suit referred to seeks to recover damages growing out of 65 different shipments of perishable products from Key West to New York. The shipments all moved over the Florida East Coast Railway, the delivering carriers being the Pennsylvania Railroad and the Baltimore & Ohio Railroad. While process was directed to James C. Davis, Director General and agent of the President under Section 206 of the Transportation Act of 1920, that process was served upon operating officials of the Florida East Coast Railroad, the Baltimore & Ohio Railroad and the Pennsylvania Railroad. The Director General and agent, etc., appeared in the action through the legal department of each of the railroads named. The legal department of the Baltimore & Ohio Railroad answered the complaint on behalf of the Director General and agent, etc., operating the Baltimore & Ohio Railroad. Afterwards the legal departments of the Florida East Coast and the Pennsylvania Railroads each sought

to answer the complaint so far as it contained allegations respecting the operation of those systems by the Director General. The District Court held that they had no right to make such answer, that the Director General had answered once, and that was all he would be permitted to do. Thus, the legal department of the Baltimore & Ohio answering for the Director General in respect to his operation of that system, is called upon to defend the Director General not only with respect to his operation of that system but with respect to his operation of the Pennsylvania system and the Florida East Coast system. This result was not contemplated by the provisions of the uniform contract under which the legal departments of the several systems are conducting litigations growing out of Federal control of railroads.

Another instance, which we believe shows the unsoundness of the decision of the courts below, arises in a suit in admiralty pending in the Southern District of New York. The libel in personam was filed against the Director General of Railroads, etc., operating the Lehigh Valley Railroad system, due to a collision in New York harbor. The respondent sought to implead the Director General operting the New York, New Haven & Hartford Railroad system, whose tug was claimed to be solely at fault. The petition to implead the Director General operating the New Haven system was dismissed by the court on the authority of the *Globe-Rutgers* decision. The practical result of that adjudication may be to entail a loss on the United States because the New Haven tug was covered by insurance while the Lehigh Valley equipment was only partially covered.

It has been argued in opposition to the contentions made in this brief, and in support of the decision that the Director General when once sued is in court for all purposes, that the result can make no difference because the payment of any judgment rendered must be made out of the United States Treasury, and whether payment is made from funds in the left-hand pocket or the right-hand pocket is immaterial. While it is true that all judgments against the Director General properly rendered must in the first instance be paid out of the Treasury of the United States, in suits in admiralty where vessels of different systems are involved and where one or both are insured, the ultimate reimbursement of the United States depends upon there being a judgment in a suit where the underwriters have an opportunity to defend in their own interests against allegations made against the particular vessel they insured. There are many such cases pending. However, the real question is, that before a judgment can properly pass against the Director General, he must be sued in the way the law provides. A judgment rendered against him in any other manner is beyond the jurisdiction of the court.

We conclude, therefore, that the judgments of the District Court and of the Circuit Court of Appeals in the instant case were incorrect in law and we ask that they be reversed and that the libel be dismissed.

Respectfully submitted,

EVAN SHELBY,
JOHN E. WALKER,
Counsel for Petitioner.

APPENDIX A.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

MANBAR COAL COMPANY, a Corporation,
Plaintiff-in-Error and
Cross-Defendant-in-Error,

versus

JAMES C. DAVIS, Agent, etc.,
Defendant-in-Error and
Cross-Plaintiff-in-Error.

(Argued February 18, 1924. Decided March 10, 1924.)

Before—WOODS and ROSE, Circuit Judges, and WEBB, District Judge.

ROSE, Circuit Judge:

The plaintiff-in-error occupied the same position below and will be so designated here. It owns and operates certain coal mines in Logan County, West Virginia, on the line of the Chesapeake & Ohio Railway Co. The declaration filed in this case contained three counts. The first and second of these are for present purposes substantially alike. In each of them, it seeks to recover from the defendant for the damage it said it suffered in consequence of the Government's failing and refusing

during the period of Federal control to furnish it with an adequate number of cars in which to transfer its coal and coke. The third charged that during the period of Federal control there was an unlawful discrimination in the furnishing of cars to its damage in that coal mines in Alabama, Arkansas, Missouri, Illinois, Indiana, Ohio, Pennsylvania and other states received a number of cars sufficient for 85% of the coal they were capable of mining and producing while the plaintiff received only 45%. Defendant 1st, moved to quash the return to the summons, 2nd filed a plea to the jurisdiction, 3rd, demurred to the declaration, 4th, by stipulation, its plea to the jurisdiction if not sustained as such was to stand as a plea in bar. To it, the plaintiff demurred. The case was submitted to the court without a jury, the parties agreeing that the allegations of the plea should be considered proved. It alleged the taking possession by the President of the railroads of the country, the appointment of the successive Directors General, the operation and use of the roads by them under a uniform and coordinated national control in which coal cars throughout the United States were pooled, allotted, assigned, distributed, located and relocated as in the judgment of the Director General for the time being, the exigencies of the war situation required. It set forth the appointment by the President on August 23, 1917, of a United States Fuel Administrator, the establishment of mine prices for coal, the issue of orders and regulations governing its distribution, the establishment of preference lists and special prices in various sections of the country, and the creation of what was known as the Zone System to govern the distribution of bituminous coal. It set up that under

the orders of the President, the Director General was required in cooperation with the Fuel Administrator so to distribute his coal cars as to carry out the orders of the latter without regard to the general principles usually governing a common carrier in the distribution of its cars. It asserted that during the period in question, the duty of the Director General in the assignment and distribution of coal cars was not as prescribed by the general law applicable to common carriers in general, but as required by the exigencies of the war and by acts of Congress, proclamations of the President, executive orders, bulletins, circulars and orders issued from time to time under the war power of Congress and the President and that the Director General distributed coal cars in accordance therewith.

The plea said that the plaintiff's complaint was as to a matter wholly administrative in its nature and during the period in question was cognizable if at all, solely by the Interstate Commerce Commission. In its argument before us, plaintiff admitted that as among the mines along the line of the Chesapeake & Ohio Railway, it had not been discriminated against. The learned court below overruled the motion to quash the return of service and upheld its jurisdiction in the action but held that the plaintiff was not entitled to recover in it. The case is here upon cross writs of error. The defendant's brief does not say anything as to the sufficiency of the service of process and we do not recall that it was mentioned in the oral argument of its counsel. At all events as to it, we see no reason to differ with the conclusion of the court below.

We shall limit what we have to say to the questions upon which the ultimate rights of the parties

depend, leaving unnoticed merely technical objections to the form and sufficiency of the pleadings, because of defects which, if they exist, are curable by amendment.

When the conditions in the coal trade are normal, the number of cars to which a miner and shipper of coal is entitled is to be measured by its reasonable requests based upon its actual needs. Pa. R. R. Co. vs. Sonman Coal Co., 242 U. S., 120, Pa. R. R. Co. vs. Puritan Coal Co., 237 U. S., 121, Illinois Central Rwy. Co. vs. Mulberry Hill Coal Co., 238 U. S., 275. It is equally clear that if because of conditions which it could not foresee, or if foreseeable, guard against, it had not and could not procure sufficient cars to furnish all the operators on its line with all the cars desired and demanded by them, it discharged its whole duty if it fairly and equitably distributed its available cars among them. Illinois Central Rwy. Co. vs. Mulberry Hill Co., *supra,* Pa. R. R. Co. vs. Puritan Coal Co., 237 U. S., 121. It follows that the plaintiff was not entitled to recover upon either of the first two counts of its declaration for the allegations of the plea which the parties agreed should be taken as proved, showed that the conditions were in the highest degree abnormal and it is admitted that among the mines along the line of the Chesapeake & Ohio R. R., the distribution of cars was fair and equitable.

Should the plaintiff take anything under its third count, the theory of which is that the Director General of railroads was bound to treat all the railroads and all the cars under his control as if they were a single system and if he had not coal cars enough to supply every mine in the United

States with all for which it had legitimate need, he was bound to work out and apply a system of distribution by which each mine should receive substantially as large a percentage of the number for which it had reasonably asked as was furnished to any other in all the wide stretch from Quoddy Head to San Diego and from Key West to Puget Sound. We shall put on one side the perhaps pertinent inquiry whether the law would require the rule of equal and ratable distribution to be rigidly applied over so great an area and in which conditions, climates, and seasonable needs differed so widely, even if all the railroads were consolidated under the control of a single privately owned company. It is at least conceivable that under such conditions many questions would arise which in the public interest and with justice to all could only be dealt with by laying down by the Interstate Commerce Commission of one of many administrative rules governing the distribution of cars.

We do not go into the inquiry, interesting as its possibilities are, because we are persuaded that Congress has given no one the right to sue the Director General or his successor, the agent designated by the President, for anything the former did or left undone as the operator of *all* the railroads in the United States. On the contrary, it has been careful to limit his liability to such acts as he did or did not do as the Director of a particular carrier. If the carrier had, previous to Federal control done or left undone what is charged against him and it could then have been sued for it, he is liable and not otherwise. Section 206A of the Transportation Act, February 28, 1920. As the Supreme Court has said each railroad system has

been personified as in admiralty ships long have been. Missouri Pacific Rwy. Co. vs. Ault, 256 U. S., 554. Unless some particular carrier as the active responsible party could previous to Federal control have been held answerable for the wrong charged against the Director General, if done by it, he is not liable. In accordance with this principle he may in the same suit, if justice requires it, be dealt with as if he were two persons and not one. Granquist vs. Duluth M. & M. Rwy. Co., 193 N. W., 126; S. Louis B. & M. Rwy. Co. vs. McLean, 253 S. W., 248. Plaintiff sued the defendant in virtue of the Director General's control of the Chesapeake & Ohio Rwy. Co. and had process served upon him by service upon an agent of that railway. He was brought into Court to answer for a wrong done by the Director General for which the Chesapeake & Ohio Railway but for Federal control would have been suable and for that wrong alone. Granquist vs. Duluth M. & M. Railway Co., supra. Plaintiff has not seriously questioned that it could not have maintained this suit prior to the enactment of the Transportation Act of February 28, 1920, but it contends that the liability of the Government to suit through the agent to be designated by the President has been greatly broadened by that enactment and especially by Sections 202 and 206 thereof. The former section in our view has primary, if not exclusive reference to the settlement of disputes and controversies between the government and the individual carriers and the report of the Conference Committee immediately preceding its enactment so indicates. Report of House of Representatives, 2nd Section, 66th Congress, Volume 1 No. 650, page 53. At all events it is certain

that it grants no authority to maintain a suit against the United States. That permission so far as it is accorded at all, is given by section 206, the purpose of which was to make sure that the return of the roads to private control should not leave remediless anyone then entitled to sue the Director General. It has many provisions which show that the sole liability for the enforcement of which it provided was that of the Director General as controller of a particular carrier. The able and industrious counsel who here argued the case for the plaintiff admitted that they knew of nothing in the legislative history either of the Act as a whole or of the particular sections of it upon which they rely, to suggest that Congress had in mind so great an extension of Federal liability as that for which they now contend. There is nothing in the words used to compel us to hold that such extension was made whether Congress intended it or not. In fact, the question is no longer open for the Supreme Court has expressly decided "that the Transportation Act of 1920, February 28, 1920 c 91, s. 206 (A) and (D) 41 Stat., 456, 461, 462, in no way invalidates a defence good when it was passed." Davis vs. Wechsler, 263 U. S., 22.

We see no occasion to determine whether the learned court below should have taken judicial notice of the state of the country during the period in question and the condition of railroad transportation then existing so far as they affected the supply and distribution of coal cars and in consequence should have sustained as the defendant contends, its demurrer to the declaration or whether it followed a wiser course in compelling the defendant to allege such matters in its plea

and prove them as by the stipulation of the parties it did. In either event, it was right in its ultimate conclusion that plaintiff was not entitled to recover and its judgment to that effect must be

Affirmed.

APPENDIX B.

Pertinent Parts of Section 206 of Transportation Act of 1920.

"SEC. 206. (a) Actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier.

(b) Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with

process in proceedings brought against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during Federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The agent designated by the President under subdivision (a) shall cause to be filed, upon the termination of Federal control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Federal control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall be supplemented from time to time, if additional contracts are made or other agents or officers appointed. * * *

(d) Actions, suits, proceedings, and reparation claims, of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a). * * *

(g) No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

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Supreme Court of the United States

OCTOBER TERM, 1923.

No. 757.

JAMES C. DAVIS, as Director General of Railroads, and Agent, etc.,

Petitioner,

vs.

TIMOTHY DONOVAN,

and

THEODORE A. CRANE'S SONS COMPANY,

Respondents.

BRIEF FOR RESPONDENT DONOVAN.

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Respondents.

BRIEF FOR RESPONDENT TIMOTHY DONOVAN.

Statement.

This action, originally instituted in 1919 against the Director General of Railroads, for whom James C. Davis, Agent, etc., has been substituted, and against Theodore A. Crane's Sons Company, comes up by writ of certiorari, granted at the instance

of the petitioner Davis, from the Circuit Court of Appeals for the Second Circuit which affirmed a final decree of the United States District Court for the Southern District of New York (Hon. John C. Knox, D. J.), in favor of the libelant Timothy Donovan and against Davis as Agent, etc. The action is in admiralty and was brought by Timothy Donovan to recover for damage to his scow Mary Ethel when moored, March 28th, 1919, at Pier 2, Erie Basin, Brooklyn, through the going adrift of New York, New Haven & Hartford Railroad carfloat No. 46, which was under repair by Theodore Crane's Sons Company. The Director General appeared generally and answered, denying that he had control and possession of carfloat No. 46 and averring that such control and possession were in Theodore Crane's Sons Company. The Director General (probably with an eye for the period of limitation) did not set out by answer or by exceptive allegations (as he might have done if he deemed the fact controlling in law) that carfloat No. 46 was cast adrift by a New York Central tug. The respondent Theodore Crane's Sons Company in its answer (page 6, fols. 13, 14) set up that a New York Central tug removed a New York Central carfloat (to which No. 46 had been made fast) and in so doing cast off the lines by which carfloat No. 46 was made fast and so caused her to go adrift. Judge Knox found that such was the fact and deemed it mattered nothing through what set of servants the Director General had set his carfloat adrift and therefore held the petitioner Davis solely liable.

At the time of the damage the vessels involved, except the Mary Ethel, were operated by the Di-

rector General of Railroads who (as appears from the sworn petition for certiorari, page 6, fol. 17) was duly served by service of process on operating officials of the New York, New Haven & Hartford Railroad system as it was in respect of damage done by a carfloat of that system that the cause of action arose. The Director General having answered and the petitioner having gone to trial without suggestion of the objection now made, the contention was raised for the first time on argument at trial that if the master and crew of a New York Central tug were the cause, though a New Haven carfloat was the instrumentality of the damage, there should be no recovery. This contention was bottomed on the theory that the Director General in the operation of the unified system of transportation was not a single representative of the United States but a multiple legal personality who must be served with process as many times and through as many channels as there are railroad systems involved. That theory was rejected by the District Court and by the Circuit Court of Appeals which maintained the principle of unified control already established in the Federal Courts, as in *Globe & Rutgers Fire Ins. Co.* vs. *Hines*, 273 Fed., 774, certiorari denied 257 U. S., 643, and recognized by this Court in *Northern Pacific R. Co.* vs. *North Dakota ex rel. Langer*, 250 U. S., 135; *Dahn* vs. *Davis*, 258 U. S., 421, and *Missouri Pacific R. Co.* vs. *Ault*, 256 U. S., 554, 557.

Theodore Crane's Sons Company was originally joined in the libel as having custody of the drifting carfloat but in the District Court was held only secondarily liable and in the Circuit Court of Appeals relieved from liability altogether, though

without appealing and consequently without costs of the appeal.

We assume that in view of the concurrent findings of fact of two courts below, this Court will take the facts as found and therefore without arguing, as in the court below, any question of fact, we may state the facts in the language of the Circuit Court of Appeals:

> "The Mary Ethel was moored at Pier 2, Erie Basin. She was damaged by contact with the New York, New Haven & Hartford Railroad Co.'s carfloat No. 46 which was negligently cast loose by a New York Central tug in removing a New York Central barge or carfloat to which the No. 46 had been made fast."

Argument.

I.

The issues.

The case is one in which the libelant claims damages because the Director General's carfloat N. Y., N. H. & H. R. Co. No. 46 drifted into collision with the libelant's barge Mary Ethel and is within the rule of *The Lousiana,* 3 Wall. (70 U. S.), 164, in which this Court said:

> "The collision being caused by The Louisiana drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis major,

> which human skill and precaution and a proper display of nautical skill could not have prevented."

The happening of the accident therefore raises a presumption of the petitioner's fault and, as the action is *in personam*, it is for him to show a cause not involving his fault. The libelant can rest upon the presumption: the burden is upon the petitioner. The petitioner may not relieve himself from that burden by proving that he struck the blow with his left hand, not with his right, and in the case at bar, his defense hardly amounts to so much.

The petitioner speaks of the operation of the New York Central tug as though the fault were in that but it was not in strictness of speech in operating their own tug, it was in handling the New Haven carfloat, that the New York Central men were negligent. So much is the question one of the management of the carfloat No. 46 that the petitioner assigned error because the District Court did not find Theodore A. Crane's Sons Company primarily at fault for not having some one on No. 46 to keep her from damaging other vessels (bottom page 30, fol. 57) and the eleventh, thirteenth, fourteenth, sixteenth, eighteenth, and nineteenth assignments of error relate exclusively to the carfloat No. 46.

It was through the instrumentality of the New Haven carfloat that the libelant's scow was damaged whether the Director General was controlling her movements through servants drawn from that railroad system or from another, and since the suit is in personam the Director General is equally liable no matter what set of servants cast the prop-

erty of the New York, New Haven & Hartford R. R. Co. into collision with the libelant's scow. The Director General did not seek to petition in the "Director General operating the New York Central Railroad," although consistently with the petitioner's theory of the case he might but this theory was an afterthought. The defense which the Director General chose to present by his answer—which should have the effect of a general appearance for all purposes—was that he did not have control of carfloat No. 46 upon the ground that such control was in Theodore Crane's Sons Company which had her under repair (Answer, page 4, fol. 9). The Director General did not claim that he lacked control because the No. 46 was cast adrift by a New York Central tug: Theodore Crane's Sons Company said that he exercised such control because the No. 46 was cast adrift by a New York Central tug (Crane Answer, page 6, fols. 13, 14). The defense that Theodore Crane's Sons Company had control having failed, the Director General raised the question whether, in substance, his liability in this action could be founded upon a finding that he was in control of the New Haven carfloat and was exercising such control through his servants on a New York Central tug. The fundamental issue in this case, as presented by the pleadings, is one of control over the instrumentality of damage. For that question the petitioner has sought to substitute another i. e., a question of service of process regarding which there is not one syllable in the record and upon which the petition for certiorari (fol. 17), states:

> "Process was duly issued by the clerk of said court and served pursuant to General

Order No. 50-A of the Director General of Railroads, promulgated January 11, 1919, upon operating officials of the New York, New Haven & Hartford Railroad, operating said railroad system for the Director General of Railroads. That no process in said cause was issued by the clerk of said court and served upon the operating officials of the New York Central Railroad, operating that railroad system for the Director General of Railroads."

II.

More than one service of process on the Director General not contemplated.

In other words, the contention of the Director General is that there should have been a duplication of service, that as he exercised his control of the property of the New York, New Haven & Hartford Railroad system through servants of the New York Central system he should have been served through officials of the latter system as well as through officials of the former system. Had we served the Director General through the New York Central officials without service through the New York, New Haven & Hartford officials, the petitioner might claim that since the damage to the Mary Ethel grew out of his control of property of the New York, New Haven & Hartford system, service should be effected through officials of the New York, New Haven & Hartford R. R. Co.

Under the petitioner's construction of General Orders 50 and 50-A, duplicate service would have

been the rule where more than one railway system was involved and the same construction would upon like reasoning be extended to §206 of the Transportation Act of 1920. Neither the General Orders nor the Transportation Act of 1920 contain a syllable relating to or even suggestive of duplicate service of process. All alike contemplate a single party defendant though before Federal Control the joinder of two or more railroad companies was frequent. Had duplicate service been contemplated in the large class of cases involving the activities or instrumentalities of more than one railroad system, it would be strange that Mr. Wm. G. McAdoo in 1918 and Congress in 1920 should omit any express reference to the subject. But if a single service was contemplated as effective for all purposes, the failure of General Orders Nos. 50 and 50-A and the Transportation Act of 1920 to refer to anything else involves no imputation of a want of forethought on the part of the United States Railroad Administration and of Congress in these well considered matters.

The plain purpose of General Orders Nos. 50 and 50-A, in providing for service upon operating officials operating for the Director General of Railroads the railroad in respect of which the cause of action arose, was obviously both to serve the convenience of litigants who thus could find some one near at hand to serve with process and to facilitate the preparation of the Director General's defense by giving notice of the suit to those who were in the best position to have notice of the facts. The provision was certainly not intended to sift jurisdictional points so fine that suit should fail where process was served through one but not

through another railroad system in some manner involved. In the case at bar, not only was the purpose of the General Orders fulfilled by service upon operating officials of the New York, New Haven & Hartford Railroad system, but such service was within the strict letter of the General Orders. Can it be fairly stated that the New York, New Haven & Hartford Railroad was not the railroad in respect of which the cause of action arose when its carfloat caused the damage and the only issue presented by the pleadings, aside from the fact of the damage, is the question whether the Director General of Railroads or Theodore Crane's Sons Company was in control of that carfloat?

III.

Unified control intends a single agency in control.

The Federal Control Act of March 21, 1918, c. 25, Section 10, 40 Stat. at L. 451 provided in reference to rates, etc., established by authority of the President and hearings of the Interstate Commerce Commission respecting their justness and reasonableness:

> "In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or charges therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coördinated national control and not in competition."

It is precisely that unified national control which Congress asserted that the petitioner's argument denies in the case at bar. Among the practical daily evidences of the consolidation of the railroad systems of the country under the Director General during the period of Federal Control were the adoption of universal mileage scrip, the consolidation of city ticket offices, the discontinuance of separate city freight or passenger offices outside of depots, the cancellation of arrangements with tourist and other similar agencies for the solicitation of passenger traffic, the discontinuance of all off-line traffic offices, the abandonment of advertising as an incident of former competitive conditions, the joint use by several railroad systems of the terminal facilities of any one of them, the discontinuance under General Order No. 24 of fire insurance policies, the relinquishment of short-line railroads, the abolishment of re-waybilling at junction points and the adoption of universal interline billing, the establishment of regional directors, the appointment of a railroad wage commission, the initiation of rates, fares, charges, classifications, regulations and practices by Presidential authority and the appropriation of a revolving fund.

General Order No. 50 provided that suit should be "brought against William G. McAdoo, Director General of Railroads and not otherwise," i. e., regardless of what particular railroad he was operating and the Transportation Act 1920 provides that the defendant shall be the agent designated by the President. The Act contemplates suit against one party only. There is no provision for service upon him in more than one capacity or for adjustment or adjudgment of responsibility as between

the Government administration of one railway system and the Government administration of another. Final judgments are to be rendered against an agent designated by the President as such generally and not in a capacity special to each railroad system and are to be paid out of a revolving fund created by §210. This revolving fund of $300,000,000 is appropriated for the payment of judgments generally without distinction in respect of the specific railroad under Federal control.

Why did General Orders 50 and 50-A in providing for service of process make use of the phrase "the railroad or other carrier in respect of which the cause of action arises" if not in a studied effort to avoid the implications of such terms as "the railroad or other carrier liable therefor" and to conform to the dominant thought that in the operation of all these systems of transportation a single Governmental agency was liable?

Federal control of the railroads was an exercise of the war power (*Northern Pacific R. Co.* vs. *North Dakota ex rel. Langer*, 250 U. S., 135) and the United States Government thereby became, in the place and stead of the owning companies, the operator of their respective systems of transportation (*Dahn* vs. *Davis*, 258 U. S., 421). The United States Railroad Administration has been authoritatively characterized as "one control, one administration, one power, for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided, the private ownership theretofore existing." (*Northern Pacific Ry. Co.* vs. *North Dakota, ex rel. Langer*, 250 U. S., 135, reiterated in *Missouri Pacific R. Co.* vs. *Ault*, 256

U. S., 554, 557). In *Missouri Pacific R. Co.* vs. *Ault, supra*, this Court held that statutory penalties for defaults in operation might not be imposed upon the owning company, since its control of the railroad was suspended, nor upon the Director General, since his possession was that of the United States. Reference to the transportation systems as "entities" was made not in connection with any suggestion of multiple legal personality in the single representative of the Government's unified administration of these systems but in explaining the statutory language "carriers while under Federal control" (Act of March 21, 1918, c. 25, Sec. 10, 40 Stat. at L. 451) as intending not the corporations but their transportation systems. These systems as they were taken over from distinct owners and were eventually to be returned to distinct owners, were treated for the purposes of accounting between the Government and the owners, as distinct properties. Over these properties, however, though all diversely owned and each to a great extent requiring a separate operating staff, the United States Government designed to have what Congress has described as "a unified and co-ordinated national control" (Federal Control Act §10) exercised through the Director General whom the President appointed as his agent in taking that possession of the railway systems which the Acts of Congress authorized the President to take. Any suit against the Director General is a suit against the United States and the point was directly ruled in *Dahn* vs. *Davis*, 258 U. S., 421. Since the suit is essentially one against the United States and since the United States took no divided but a complete possession and control

of the railways for all purposes (*Northern Pacific Ry Co.* vs. *North Dakota ex rel. Langer*, 250 U. S., 135) it should follow that its agent for that purpose, standing suit as such, had a capacity as unified as the control he exercised. There is no substance to the theory that between the private litigant and the remedy against the Government there has been interposed a shifting phantasm, a multiple personality under one name, a series of legal entities representative of the Government, not of the owning companies, yet as numerous as the transportation systems.

In *Globe & Rutgers Fire Ins. Co.* vs. *Hines*, 273 Fed., 774, where an insurance company, which had insured a carfloat of the Central Railroad Company of New Jersey system and had paid a collision loss, claim by right of subrogation to sue the President's agent on the ground that the loss was due to the negligence of a New York Central tug, the Circuit Court of Appeals for the Second Circuit held that the libel should be dismissed. The Director General's brief in the case at bar contends that the only point decided was that the Director General could not sue himself but this conclusion was founded not upon the personal identity of the official but upon the official identity of the capacity in which the Director General operated both systems. Without rendering this brief too unwieldy by quotation, we may excerpt the concluding paragraph of the opinion:

> "The fact that in suits of this nature a practice grew up of describing the Director General as operating a certain system or line of road, out of the operation of which the cause of action arose, is without legal significance.

It could not affect in any degree his corporate capacity. There was but a single Director General, one corporate entity. The Director General of Railroads operating the New York Central Railroad was the same legal entity as the Director General operating the Central Railroad of New Jersey. The words 'operating the Central Railroad of New Jersey' constitute merely a descriptive phrase, adopted by counsel for convenience, and not recognized nor provided for by anything in the acts of Congress or in any proclamation of the President. It is therefore impossible that the Director General of Railroads, operating the Central Railroad Company of New Jersey float No. 47, should be able, under the established rules of legal procedure, to maintain an action at law, or a suit in equity, or a proceeding in admiralty against the Director General operating the New York Central steam tug No. 27. Inasmuch as the libelant stands in the place of its insured, the libel fails to state a cause of action."

In *Davis* vs. *Alexander,* 220 Pac., 358 (Oklahoma), an action by a shipper of cattle to recover for delays en route on a continuous line made up of three railways, the Director General, having been served through an official of one railway company, contended that the Court did not acquire jurisdiction of the defendant so far as the plaintiffs' cause of action concerned the operation of another railway company's line by the Director General. The Court rejected this contention and, after summarizing the history of Federal Control, said:

"All of the railroads and systems of railroads of this country were taken over by the United States government and operated under Federal control as one grand national system of railroads, and for the operation of these roads the United States was alone answerable. The only connection the owners of these various roads had with them, under Federal control, was that they retained their ownership of said roads and were paid by the government for the use thereof. Negligence in operation of said roads was, in law, negligence of the Director General, and an action for damages resulting from such negligence could be maintained against the Director General, regardless of what railroad in the operation of which negligence occurred, and without regard as to whether the railroads were related as parts of the same corporate system or that one was the agent or subsidiary line of the other under corporate control. * * *

Under the Transportation Act 1920, an action against the Federal agent of railroads for damages suffered from the operation of railroads under Federal control is an action against the United States. Whalen Paper & Pulp Mills vs. Davis (App. D. C.), 288 Fed., 438. * * *

* * * It is conceded that process was regularly served on the service agent of the Chicago, Rock Island & Pacific Railroad, and that the Court acquired jurisdiction of the defendant, the Federal agent, in so far as the cause of action concerned the operation of the Chicago, Rock Island & Pacific Railroad; but

it is contended that, inasmuch as process was not served on the service agent or any officer of the Chicago, Rock Island & Gulf Railroad, the Court acquired no jurisdiction of the defendant as far as the plaintiffs' cause of action concerned the operation of the Chicago, Rock Island & Pacific Railroad. This position is not tenable for this is not an action against these several roads, but is an action against the Federal agent." * * *

In *Red Hook Dredging Corporation* vs. *Director General of Railroads*, a case in which the New York Central tug No. 18 set some scows adrift and in answer to her signal for aid the tugs Dispatch and Montauk of other railroad systems got lines out to the drifting barges and landed them alongside a scow outside a dredge which, being moored by spuds, received damage from the weight of the flotilla hanging upon her, Ward, J., in an unreported opinion dated January 20, 1922, said in part:

"No doubt for the purposes of the Interstate Commerce Commission and also for the benefit of the carriers when Federal control should terminate, the accounts of each carrier were to be kept by the Director General of Railroads separately. But he operated them all and the Government made itself responsible for liabilities incurred by him during its control. He had all income in his hands from all the carriers over the compensation agreed upon with each and also the revolving fund out of which to make good such liabilities. Each of the tugs involved in the transaction

was operated by him. They were his agents and he is responsible for their defaults. The tug Dispatch of the Central Railroad of New Jersey and the tug Montauk of the Long Island Railroad Company were not independent third persons whose intervention, in the language of Wharton on Negligence, Sec. 134, 'acts as a non-conductor and insolates my negligence so that I cannot be sued for the mischief which the person intervening directly produces.' The Government is clearly liable for all damages caused by its operation of the carriers, opinion Supreme Court in *Missouri Pacific R. R. Co.* and *Walker D. Hines, Director General of Railroads* vs. *Ault,* handed down June 1, 1921."

To the United States will make no difference whether the Government is to pay the decree because of the negligence of the New Haven carfloat or of because of the negligence of the New York Central tug.

The Tug Newark, 1923 A. M. C., 727.

In *Manbar Coal Company* vs. *Davis,* decided by the Circuit Court of Appeals for the Fourth Circuit and relied upon by the petitioner, the actual holding was that the Director General was not obligated to supply more cars than he did to the coal company or, in a period of diversified war time necessities and in a country-wide extent of territory of varied needs, to apportion the same percentage of available cars to coal mines in one State as in another.

The petitioner has cited *Whalen Paper & Pulp Mills* vs. *Davis*, 288 Fed., 438, in the Court of Appeals of the District of Columbia, but in the case cited there was no service of process upon the defendant by delivery thereof to any agent or officer of any railroad, the only service made was upon the defendant personally and he promptly filed a motion to quash the service.

Among the State court decisions cited by the petitioner is *Davis* vs. *L. N. Dantzler Lumber Co.*, 126 Miss., 812, 89 So., 148, where the plaintiff attempted to garnishee a railroad under Federal control for an *ante bellum* indebtedness of another railroad to the plaintiff. This case is cited by the petitioner as interpreting *Missouri Pac. R. Co.* vs. *Ault*, but was said by this Court to be "based on a misunderstanding of the Ault case" and was accordingly reversed, 261 U. S., 280.

In *Bostwick* vs. *Director General of Railroads*, 220 Mich., 21, a very different question was presented, whether Federal control made the employees of different systems fellow servants within the scope and intent of the Federal Employers' Liability Act and in *Payne* vs. *Lyon*, 154 Ga., 501, an action by a locomotive fireman to recover damages for personal injuries, the decision was based on error in the admission of evidence and the capacity of the Director General was discussed only in connection with the point that rules made for one railroad system were not binding upon another though both were under Federal control.

Several of the State court opinions cited by the petitioner proceed upon the fallacious assumption that because the owning companies were and continued to be separate, therefore the control which displaced them was as multiple as they. The very

reason the owning companies were displaced in the possession of their systems of transportation was to secure a unified control which should involve a unitary liability.

IV.

Remedial provisions, broadly expressed, not to be narrowly construed.

It would be unbecoming, in a court or citizen jealous of the honor of our country, to impute to Congress the intent to hold out to private suitors an apparent remedy for redress of wrongs suffered through Government administration and at the same time to render this remedy ineffective through technicalities not of express requirement but of concealed implication. Congress intended to afford an effective remedy on terms of easy compliance and express statement, but the argument now put forth for the petitioner would in great part render ineffective this predominant purpose of Congress.

The decree under review should be affirmed with costs.

Respectfully submitted,

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Timothy Donovan.